filed. However, it was not until 9 February 1988 that the first defendant bestirred himself by filing the application to set aside the default judgment.

Having regard to the chronology of events, I find that the first defendant has been guilty of laches and his conduct has not been bona fide. In all the circumstances, I had no hesitation in dismissing the application with costs.

Order accordingly.

Solicitors: *Presgrave & Matthews*; *Ooi Lee & Co.*

Reported by *PS Ranjan*

Allied Properties Sdn Bhd v Semua Holdings Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – ORIGINATING SUMMONS NO D2–31–201–87
SITI NORMA YAAKOB J
26 JULY 1988

Companies and Corporations – Rectification of register of members of company – Directors refusing to register transfer of shares – Whether refusal bona fide – Whether there was delay in communication of refusal – Whether person claiming beneficial ownership of shares was the aggrieved party – Companies Act 1965, ss 105, 131(5) & 162

The applicant had granted three loans to Malaysian Fancy Plywood and Veneer Company Ltd. As security for the loans:

(a) Ho Kong Meng Holdings ('HKM Holdings') pledged 92,000 of their shares in the first respondent, Semua Holdings Sdn Bhd ('Semua Holdings'), to the applicant, for the first loan;
(b) the fifth respondent together with Ho Hock Chye, Ho Thiam Hock, Ho Chye Thin and Ho Thiam Chiew pledged either all or part of their respective shares totalling 112,000 in Semua Holdings to the applicant for the second loan; and
(c) HKM Holdings and the fifth respondent pledged their remaining shares in Semua Holdings totalling 400,000 to the applicant for the third loan.

Pursuant to various agreements evidencing the pledging of the shares, the pledgors gave their written consent to the applicant to the registration of the pledged shares in the name of the applicant or their nominees and instructed Semua Holdings by a letter dated 25 July 1986 to register the shares in the name of the applicant's agents D & C Bank Nominees Sdn Bhd ('the nominees').

In response to the request, following a decision of its directors, Semua Holdings wrote to the nominees asking for the true identity of the beneficial owner of the shares. The nominees replied that the beneficial owner was Credit Lyonnais of Hong Kong for the account of HKM Holdings and they, the nominees, were acting for their customer only. Semua Holdings wrote asking for more particulars but before the nominees could reply, Semua Holdings had written to the nominees a letter dated 23 September 1986, informing them that the directors of Semua Holdings had unanimously rejected the nominees' request for registration. The nominees sent a second letter to Semua Holdings dated 26 September 1986 supplying all the necessary information on Credit Lyonnais and for the first time revealing that the applicant would be the ultimate beneficial owner and by the same letter they re-submitted the request for registration of the shares in the name of the applicant. That request too was rejected. Semua Holdings declined to give reasons for the decision stating that under art 23 of their articles of association they were not obliged to give reasons.

The applicant brought proceedings seeking to rectify the register of members of Semua Holdings by striking out the names of the pledgors in respect of the pledged shares and substituting the name of the applicant as the owner of the shares.

Three issues were raised at the hearing, namely:

(a) whether the applicant was the aggrieved party under s 162 of the Companies Act 1965 (the 'Act');
(b) whether Semua Holdings had delayed in communicating their decision to refuse registration; and
(c) whether the directors of Semua Holdings had exercised their discretion bona fide in refusing registration.

Held, allowing the application: (1) As the applicant was the ultimate beneficial owner there could be no doubt whatsoever that the applicant was the person aggrieved by the refusal of Semua Holdings to register the shares in the name of either the applicant or their nominees. The fact that the nominees were not a party to the action was quite immaterial to the real issue at hand which was whether the respondents had a right to refuse registration and, if so, whether that right had been properly and legally exercised.

(2) In respect of the first request for registration of the transfer, Semua Holdings had not complied with the mandatory requirement of deciding within one month on a request for registration. However, by the submission of the second request in the light of the request for information by Semua Holdings as to the true owner of the shares, both parties had waived whatever rights or obligations both had under art 23 and s 105 of the Act as regards the first request.

(3) The second request was lodged on 26 September 1986 and rejected by notice on 10 October 1986 and hence Semua Holdings were well within the statutory period of one month and to that extent the applicant's contention that Semua Holdings had failed to comply with art 23 read with s 105 of the Act was not correct.

(4) When exercising their discretion to refuse registration, the directors of Semua Holdings had to act in good faith. The third and fifth respondents were father and son respectively and the founder members of HKM Holdings, their family company. They had pledged their shares to the applicant and they must have known that what the nominees were requesting was nothing more than to enable the applicant to perfect its securities by applying to have the shares registered in their name. The third and fifth respondents were statutorily bound to disclose their personal interests in HKM Holdings as well as HKM Holdings' pledge to the applicants, interests that were also required to be disclosed under the articles of association of Semua Holdings. In failing to do so, they had clearly shown themselves to be harbouring an ulterior motive as, being the beneficial owners of the shares so pledged, they tended to gain

by Semua Holdings' refusal to register the transfer. As the exercise of their discretion was clearly a breach of their statutory duty, the exercise of such a discretion was not bona fide. The fact that only two members of the board had not exercised their discretion bona fide did not, however, make the other directors less liable for their action, as the decision to refuse was a collective action of the board. Since two of its members had acted in bad faith, that made the whole decision null and void. The applicant could not be denied its right to have the shares so pledged to be registered in its nominees' name.

Legislation referred to
Companies Act 1965 ss 105, 135(1) & 162

T Thomas (*FT Yip* with him) for the applicant.
Josephine Pereira (*Miss*) for the respondents.

Cur Adv Vult

Siti Norma Yaakob J: In this originating summons, the applicant seeks to rectify the register of members of the first respondent by striking out the names of the following members,

(1) Ho Kong Meng Holdings Sdn Bhd ('the Holdings'), as the holder of 292,200 shares
(2) the fifth respondent, as the holder of 132,000 shares
(3) Ho Hock Chye, as the holder of 120,000 shares
(4) Ho Thiam Hock, as the holder of 20,000 shares
(5) Ho Chye Thin, as the holder of 20,000 shares
(6) Ho Thiam Chiew, as the holder of 20,000 shares

and substituting its name as the holder of all their shares, totalling 604,000 altogether.

From 1981-86, the applicant granted three loans to Malaysian Fancy Plywood and Veneer Company Ltd. As securities:

(1) Holdings pledged 92,000 of its shares in the first respondent, to the applicant, for the first loan.
(2) the fifth respondent together with Ho Hock Chye, Ho Thiam Hock, Ho Chye Thin and Ho Tham Chiew pledged either part or all of their respective shares totalling 112,000, in the first respondent, to the applicant, for the second loan and
(3) Holdings and the fifth respondent pledged their remaining shares in the first respondent, totalling 400,000 to the applicant, for the third loan.

The pledging of the above securities is evidenced by three security deposit agreements ('the agreements') and the pledgees also deposited the relevant share certificates of all the 604,000 shares together with the duly executed transfer forms with the applicant.

Clause 6 of two of the agreements, both stamped 18 February 1982, contains similar provisions allowing the applicant at any time, to register the 204,000 shares so pledged, in its name or that of its nominees, without notice to any of the pledgees.

Clause 5 of the third set of agreements, all dated 30 January 1986, expressly allows the applicant, with notice to the pledgees mentioned therein, namely Holdings, Ho Hock Chye and the fifth respondent, and with their written consent, to register the remaining 400,000 shares so pledged to its name or that of its nominess.

Accordingly by letter dated 25 July 1986, all the pledgees gave their consent and instructed the first defendant to register their entire holdings of 604,000 shares into the name of the applicant's agents D & C Bank Nominees Sdn Bhd ('the nominees'). This was followed, the next day, by the nominees submitting the relevant share certificates and transfer forms to the first respondent with a request that all 604,000 shares be transferred and registered in their names. This was received by the first respondent on 1 August 1986.

On 22 August 1986, the Board of Directors of the first respondent, met and decided that they needed to know the true identity of the beneficial owner before they can consider the nominees' request for registration. A letter to that effect was despatched the next day to the nominees and by their reply dated 2 September 1986, the nominees confirmed with the first respondent that the beneficial owner of the shares was Credit Lyonnais, Hong Kong, for the account of Holdings, that they, the nominees were acting for their customer only.

Not satisfied with their reply, the first respondent by its letter dated 10 September 1986 requested for more particulars of Credit Lyonnais. However, before the nominees could supply the information asked for, they received a letter dated 23 September 1986 from the first respondent informing them that the board of directors at a second board meeting held on 20 September 1986 had unanimously rejected the nominees' request for registration and accordingly returned all the share certificates and transfer forms to the nominees.

Undaunted by the refusal, the nominees despatched their letter dated 26 September 1986 wherein they supplied all the necessary information on Credit Lyonnais and for the first time revealed that the applicant will be the ultimate beneficial owner and in the same letter too, they re-submitted the share certificates and transfer forms and again requested that the shares be registered in their names, in the light of the additional information they had supplied. On 9 October 1986, the first respondent by a circular resolution of the board unanimously rejected the said request for registration and notified the nominees accordingly by letter dated 10 October, 1986.

On 21 January 1987, the applicant's solicitors took up the matter by requesting the first respondent to register the shares and inquiring as to the reasons for its earlier refusals. By its reply dated 6 February 1987, the first respondent again rejected the request for registration and explained that its refusal was based on the exercise of the Board's discretion under its articles of

association. When further pressed for the grounds of its refusal, the first respondent replied that under art 23 of its articles of association, it was not obliged to disclose the ground for such refusal.

The matter then proceeded to court by the filing of this originating summons on 16 July, 1987 and in addition to the first respondent, the other six respondents are added as parties to this action by virtue of their being the directors of the first respondent and additionally in the case of the fifth respondent, he is also one of the pledgees.

Three issues were raised at the hearing:

(1) whether the applicant is the aggrieved party under s 162 of the Companies Act 1965 ('the Act');
(2) whether the first respondent had delayed in communicating its decision to refuse registration;
(3) whether there has been a bona fide exercise of their discretion to refuse registration by the second to seventh respondents.

Relief under s 162 of the Act can only be granted to a person who has been aggrieved by the omission of his name from the register of members and in this respect, the respondents maintain that the applicant is not the person aggrieved as all along the requests to register the shares were made by its nominees.

From the undisputed facts, it is very clear that D & C Bank Nominees Sdn Bhd are the agents of the applicant, who is the ultimate beneficial owner of the shares to be registered. As the ultimate beneficial owner, there can be no doubt whatsoever that the applicant is the person aggrieved by the refusal of the first respondent to register the shares in either its name or that of its nominees. The fact that the nominees are not made a party to this action is quite immaterial to the real issue at hand which is whether the respondents have a right to refuse registration, and if so, whether that right has been properly and legally exercised.

The decision to refuse registration was made by the second to seventh respondents in the exercise of their discretion under art 23 of the articles of association of the first respondent. The second limb of that article provides that 'if the directors refuse to register a transfer, they shall within one month after the date on which the transfer was lodged with the company, send to the transferee and transferor notice of refusal in accordance with s 105 of the Act'.

It is not disputed that the transfer forms were lodged with the first respondent on 1 August 1986 and that under art 23, the first respondent is statutorily bound to communicate its refusal to register to the applicant by 1 September 1986.

The first respondent held an emergency board meeting on 22 August 1986 where, with the exception of the fourth respondent, the second, third, fifth, sixth and seventh respondents were present. At this meeting, the board unanimously agreed that the nominees disclose the identity of the beneficial owner of the shares. A second board meeting was held on 20 September 1986 where the second, fourth, fifth and sixth respondents were present and they unanimously decided to reject the nominees' request for registration. On 23 September 1986, the first respondent notified the nominees of the refusal to register. Clearly, from the sequence of events and the dates they occurred, the first respondent had not complied with the mandatory requirement of one month and the matter would have ended there.

However, the nominees re-submitted the second request for registration on 26 September 1986 in the light of the further information sought by the first respondent as to the true owner of the shares. By so doing and by its acceptance, both parties have waived whatever rights or obligations both had under art 23 read with s 105 of the Act as regards the first request for registration.

Since the second request for registration was lodged with the first respondent on 26 September 1986, the first respondent had until 26 October 1986 within which to notify the nominees of its refusal to register. As this was done by letter dated 10 October 1986, well within the statutory period of one month, I had held that the first respondent had not delayed in communicating its refusal to the nominees and to that extent the applicant's contention that the first respondent had failed to comply with art 23 read with s 105 of the Act is not correct.

Coming now to the all-important issue as to whether the second to seventh respondents had properly exercised their discretion to refuse registration under art 23, it must first be borne in mind that they had every right to do so. But when exercising their discretion, it must be done bona fide. What is bona fide depends on the facts of each case and in this instant suit, it would appear from the documentary evidence that the third and fifth respondents played a very active role in the decision to refuse registration.

As the identity of the beneficial owner of the shares was the deciding factor that prompted the first respondent to refuse registration, I now turn to the affidavit evidence to consider the decisions taken at the two board meetings that were convened and the circular resolution dated 9 October 1986.

At the first board meeting on 22 August 1986, with the exception of the fourth respondent, all the other directors were present. It was decided at this meeting that the true beneficial owner of the shares be ascertained before the request of the nominees could be considered. The third and fifth respondents are father and son and the founder members of Holdings, their family company. They had pledged their shares to the applicant and they

must know that what the nominees were requesting was nothing more than to enable the applicant to perfect its securities by applying to have them registered. At that first board meeting they were already fully aware who the beneficial owner was but nonetheless they participated in a decision which runs contrary to common sense.

In this respect, I also hold that as directors, the third and fifth respondents are statutorily bound under s 131(5) of the Act to disclose their personal interests in Holdings as well as Holdings' pledge to the applicant, an interest that is also required to be disclosed under art 81 of the articles of association. In failing to do so, the third and fifth respondents have clearly shown to be harbouring an ulterior motive as being the beneficial owners of the shares so pledged, they tend to gain by the first respondent's refusal to register. What is more, as the exercise of the discretion is clearly a breach of their statutory duty, I can only conclude that the exercise of such a discretion was not made bona fide.

The fifth respondent continued with his pretence of not being aware of the identity of the beneficial owner of the shares by again participating in the board meeting on 20 September 1986 where the request to register was rejected. The third respondent also behaved likewise when, together with the four other directors, he signed the circular resolution dated 9 October 1986 rejecting the nominees' second request for registration.

From the very behaviour of the third and the fifth respondents in participating in a decision of a matter for which there is clearly shown to be a conflict of interest, I had concluded that there has not been a proper exercise of the discretion to refuse registration and to that extent, the applicant cannot be denied its right to have the shares so pledged to be registered in its nominees' names in terms of prayers A and B of the amended originating summons.

The fact that only two members of the board had not exercised their discretion bona fide does not, however, make the other directors less liable for their action, as the decision to refuse was a collective action of the board. Since two of its members had acted in bad faith that makes the whole decision null and void.

All the directors of the first respondent have been cited as parties to this action by virtue of art 21 of the articles of association as being the only persons in the first respondent's company who can exercise the discretion to refuse or allow registration. However, as the evidence points to the third and the fifth respondents as being the two directors who had exercised their discretion improperly, and since I have the power under s 162(1)(b) of the Art to order damages against them, I had accordingly ordered that they pay damages to the applicant to be assessed by the senior assistant registrar and that the costs of this originating summons be borne by all the respondents.

Order accordingly.

Solicitors: *Syed Alwi, Ng & Teoh; Rashid & Lee.*

Reported by *PS Ranjan*